UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PENN WEST PETROLEUM LTD. SECURITIES LITIGATION	Master File No. 14-cv-6046-JGK

MEMORANDUM OF LAW IN SUPPORT OF CO-LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

Date: June 3, 2016

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Court-appointed Co-Lead Counsel, Bernstein Litowitz Berger & Grossmann LLP ("BLB&G) and Glancy Prongay & Murray LLP ("GP&M") (collectively, "Co-Lead Counsel"), respectfully request that the Court grant their motion for an award of attorneys' fees in the amount of 25% of the Settlement Fund,[1] or US$4,939,820.50, plus interest earned at the same rate as the Settlement Fund.[2] Lead Counsel also seeks reimbursement of: (i) $320,317.47 in litigation expenses that Co-Lead Counsel reasonably and necessarily incurred in prosecuting and resolving the Action, and (ii) $5,241.44 in total costs and expenses incurred by the Court-appointed Lead Plaintiffs, the City of Miami Fire Fighters' and Police Officers' Retirement Trust ("Miami FIPO") and Avi Rojany (collectively "Lead Plaintiffs"), directly related to their representation of the Settlement Class, as authorized by the Private Securities Litigation Reform Act of 1995 (the "PSLRA").

I. PRELIMINARY STATEMENT

The proposed Settlement, which provides for a payment of Can$26,500,000 in cash (or US$19,759,282) in exchange for the resolution of the Action, represents a very favorable result for the Settlement Class, particularly when juxtaposed against the significant hurdles that Lead Plaintiffs would have had to overcome in order to prevail in this complex securities fraud litigation. In undertaking this litigation, Co-Lead Counsel faced numerous challenges to establishing liability, loss causation and damages. The risk of losing was very real, and it was greatly enhanced by the fact that Co-Lead Counsel would be litigating against a corporate defendant represented by highly

[1] Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the February 12, 2016 Stipulation and Agreement of Settlement (the "Stipulation") (ECF 121-1).

[2] The Notice informed the Settlement Class that Co-Lead Counsel would apply to the Court for an award of attorneys' fees in an amount not to exceed 25% of the Settlement Fund.

skilled defense counsel, under the heightened pleading standard of the PSLRA. Moreover, even if Lead Plaintiffs had won at trial, Penn West's weak financial condition and rapidly depleting insurance coverage meant that there was a serious risk that Defendants would have been unable to pay any judgment. There was, therefore, a strong possibility that the case would yield little or no recovery after many years of costly litigation. Despite these risks, Co-Lead Counsel collectively worked 4,823.20 hours over the course of nearly two years, all on a contingency basis with no guarantee of ever being paid.

Co-Lead Counsel believe that an attorney fee award of 25% properly reflects the many significant risks taken by Co-Lead Counsel, as well as the excellent result achieved in a hard fought and difficult litigation. When examined under either the percentage of the fund or lodestar methods for calculating attorneys' fees, the requested fee is reasonable, and well within the range of attorneys' fees awarded in similar complex, contingency cases. In addition, the costs and expenses requested by Lead Plaintiffs and their counsel are likewise reasonable in amount, and they were necessarily incurred in the successful prosecution of the Action. Accordingly, they too should be approved.

II. FACTUAL AND PROCEDURAL HISTORY

The concurrently filed Joint Declaration of John Rizio-Hamilton and Lionel Z. Glancy in Support of (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration" or "Joint Decl.") is an integral part of this submission. For the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; the risks and uncertainties of continued

litigation; and a description of the services Co-Lead Counsel provided for the benefit of the Settlement Class.[3]

ARGUMENT

III. THE COMMON FUND DOCTRINE APPLIES TO THE SETTLEMENT

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The Second Circuit has confirmed that attorneys who create a "common fund" are entitled to "a reasonable fee – set by the court – to be taken from the fund." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000).

"The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost." *Goldberger*, 209 F.3d at 47; *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007). Courts have also recognized that awards of reasonable "attorneys' fees from a common fund serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future misconduct of a similar nature." *Veeco*, 2007 WL 4115808, at *2; *see also Hicks v. Morgan Stanley & Co.*, 01 Civ. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

For the common fund doctrine to apply, "the applicant's efforts must confer a 'substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread costs proportionately among

[3] All citations to "¶ __" and "Ex. __" in this memorandum refer, respectively, to paragraphs in, and Exhibits to, the Joint Declaration.

them,' an award of attorneys' fees must operate to shift the costs of litigation to that group." *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (quoting *Mills v. Elec. Auto-Lite Co.,* 396 U.S. 375, 393-94 (1970)). All these elements are present here: Co-Lead Counsel's efforts have conferred a substantial benefit (US$19,759,282 in cash) on an ascertainable class, and a fee award from the common fund will operate equitably "to shift the costs of litigation" to the benefitting group – the Settlement Class Members. Accordingly, the Court should award attorneys' fees from the common fund.

IV. THE COURT SHOULD AWARD A REASONABLE PERCENTAGE OF THE COMMON FUND

In the Second Circuit, courts "may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method." *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010), (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 121 (2d Cir. 2005)). The Supreme Court has, however, suggested that in common fund cases the attorneys' fee should be determined on a percentage-of-recovery basis. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class . . ."). Similarly, the "trend in this Circuit is toward the percentage method," rather than the lodestar method. *Wal-Mart*, 396 F.3d at 121.

"There are several reasons that courts prefer the percentage method," including, among others, the fact that it: (i) "directly aligns the interests of the class and its counsel because it provides an incentive to attorneys to resolve the case efficiently and to create the largest common fund out of which payments to the class can be made"; (ii) is "closely aligned with market practices because it mimics the compensation system actually used by individual clients to compensate their attorneys"; (iii) "provides a powerful incentive for the efficient prosecution and early resolution

of litigation"; (iv) "discourages plaintiffs' lawyers from running up their billable hours, one of the most significant downsides of the lodestar method"; and (v) "preserves judicial resources because it relieves the court of the cumbersome, enervating, and often surrealistic process of evaluating fee petitions." *Johnson v. Brennan*, No. 10 Civ. 4712 (CM), 2011 WL 4357376, at *14-15 (S.D.N.Y. Sept. 16, 2011) (citations and quotation marks omitted). "In contrast, the lodestar [method] creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits." *Wal-Mart*, 396 F.3d at 121.

The percentage method also comports with the PSLRA, which states that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. § 78u-4(a)(6); *see also In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 CM, 2007 WL 2230177, at *16 (S.D.N.Y. July 27, 2007) ("the PSLRA implicitly supports the use of the percentage of the fund method"); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) (noting "the PSLRA's express contemplation [of] the percentage method" in "calculate[ing] attorneys' fees in securities fraud class actions").

Use of the percentage method does not, however, render lodestar irrelevant. Rather, part of the reasonableness inquiry is a comparison of the lodestar to the fees awarded pursuant to the percentage of the fund method "[a]s a 'cross-check.'" *Wal-Mart*, 396 F.3d at 123 (quoting *Goldberger*, 209 F.3d at 50). "[W]here [the lodestar method is] used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50. "Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case" (*id.*), or "[t]he district courts [ ] may rely on summaries

submitted by the attorneys and need not review actual billing records," *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005). *See also Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 184 (W.D.N.Y. 2011); *Johnson*, 2011 WL 4357376, at *14-15.

In sum, the weight of authority suggests that the Court should use the percentage-of-recovery method, with a lodestar cross-check, in determining a reasonable attorneys' fee. *See Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07 Civ. 2207 (JGK), 2010 WL 3119374, at *6 (S.D.N.Y. Aug. 6, 2010) (Koetl, J.) ("applying a lodestar 'cross-check'"); *In re Bristol-Myers Squibb Sec. Litig.*, 361 F. Supp. 2d 229, 233 (S.D.N.Y. 2005) ("Typically, courts utilize the percentage method and then 'cross-check' the adequacy of the resulting fee by applying the lodestar method."); *Hicks*, 2005 WL 2757792, at *10.

V. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

A. The Requested Attorneys' Fees Are Reasonable Under the Percentage-of-the-Fund Method

The 25% fee requested by Co-Lead Counsel is well within the range of percentage fees that have been awarded in the Second Circuit in comparable securities class actions. *See City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.,* 954 F. Supp. 2d 276, 281 (S.D.N.Y. 2013) (awarding 25% of $19.5 million settlement fund and noting that 25% is an "increasingly used benchmark"); *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, No. 12-2389, 2015 WL 6971424, at *11-12 (S.D.N.Y. Nov. 9, 2015) (33% of $26.5 million); *Citiline Holdings, Inc. v. iStar Fin., Inc.*, No. 1:08-cv-03612-RJS, slip op. at 1 (S.D.N.Y. Apr. 5, 2013), ECF No. 127 (awarding 30% of $29 million) (Ex. 7); *In re Sadia S.A. Sec. Litig.,* No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *3 (S.D.N.Y. Dec. 28, 2011) (awarding 30% of $27 million); *In re L.G. Philips LCD Co. Sec. Litig.*, No. 1:07-cv-00909-RJS, slip op. at 1 (S.D.N.Y. Mar. 17, 2011), ECF No. 82 (awarding 30% of $18 million) (Ex. 8); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F.

Supp. 2d 418, 433 (S.D.N.Y. 2001) (awarding 25% of $21 million); *Police & Fire Ret. Sys. of City of Detroit v. SafeNet, Inc.*, No. 06-cv-5797 (PAC), slip op. at 2 (S.D.N.Y. Dec. 20, 2010), ECF No. 140 (awarding 28.5% of $25 million) (Ex. 9); *In re Tower Grp. Int'l Ltd. Sec. Litig.,* 13 Civ. 5852 (AT), slip op. at 2 (S.D.N.Y. Nov. 23, 2015), ECF No. 178 (awarding 25% of $20.5 million) (Ex. 10); *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM)(GWG), 2014 WL 1883494, at *12 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015) (awarding 33% of $15 million).

Moreover, courts have repeatedly awarded fees of 25% or more where a settlement was reached during the pendency of a motion to dismiss or shortly after, and where no or very limited discovery had been obtained as a result of the PSLRA discovery stay. *See L.G. Philips*, slip op. at 1 (awarding 30% of $18 million, representing a multiplier of 3.17, where settlement was reached while motion to dismiss was pending) (Ex. 8); *Taft v. Ackermans*, No. 02 Civ. 7951 (PKL), 2007 WL 414493, at *10 (S.D.N.Y. Jan. 31, 2007) (awarding 30% of $15.2 million, representing a 1.44 multiplier, where settlement was reached while motion to dismiss was pending); *Del Global*, 186 F. Supp. 2d at 370 (awarding 33.3% of $11.5 million, representing a 4.65 multiplier, where settlement was reached while motions to dismiss were pending); *In re Am. Express Fin. Advisors Sec. Litig*., No. 04 Civ. 1773 (DAB), slip op. at 8 (S.D.N.Y. July 18, 2007), ECF No. 170 (awarding 27% of $100 million, representing a 2.8 multiplier, where settlement was reached while motion to dismiss was pending) (Ex. 11); *Ark. Teacher Ret. Sys. v. Bankrate, Inc.*, No. 13-cv-7183 (JSR), slip op. at 2 (S.D.N.Y. Nov. 25, 2014), ECF No. 87 (awarding fee of 25% of $18 million, where case settled shortly after decision on motion to dismiss) (Ex. 12).

One of the merits of awarding fees on a percentage basis is that it does not penalize attorneys for achieving a prompt resolution of a case, where, as here, Co-Lead Counsel have

developed sufficient information concerning the strengths and weaknesses of the case necessary to make an informed decision about the value of the claims. *See Wal-Mart,* 396 F.3d at 121 (one of the merits of the percentage method is that it "provides a powerful incentive for the efficient prosecution and early resolution of litigation") (citation omitted); *Savoie v. Merchs. Banks*, 166 F.3d 456, 461 (2d Cir. 1999) (the percentage method "removes disincentives to prompt settlement").

In sum, Co-Lead Counsel's request for a 25% attorneys' fee is squarely within the range of fees awarded in the Second Circuit for comparable securities class actions.

B. The Lodestar "Cross-Check" Strongly Supports the Reasonableness of the Requested Fee

A lodestar "cross-check" confirms the reasonableness of the requested fee award. *See Goldberger*, 209 F.3d at 50. The "lodestar" is calculated by multiplying the number of hours expended on the litigation by each particular attorney or paralegal by their current reasonable and customary hourly rate, and totaling the amounts for all timekeepers.[4] Additionally, "[u]nder the lodestar method of fee computation, a multiplier is typically applied to the lodestar." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004). "The multiplier represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *Id.* (citing *Goldberger*, 209 F.3d at 47); *Savoie*, 166 F.3d at 460; *see also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010

[4] The Supreme Court and courts in this Circuit have both approved the use of current rates in the lodestar calculation to "compensate for the delay in receiving compensation, inflationary losses, and the loss of interest." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989); *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989).

WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010) ("[A] positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors."); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG)(RER), 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) ("Where … counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar").

Here, Plaintiffs' Counsel (including attorneys, paralegals, investigators and professional support staff) collectively devoted a total of 4,823.20 hours to the prosecution of this Action, resulting in a lodestar of $2,546,427.50. ¶ 69. Based on a 25% fee (which would equate to roughly $4,939,820), Co-Lead Counsel's lodestar of $2,546,427.50 would yield a multiplier of 1.94. This multiplier is well within the range of multipliers commonly awarded in securities class actions and other complex litigation. *See Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5 as reasonable on appeal); *Bellifemine*, 2010 WL 3119374, at *6 (Koetl, J.) ("counsel requests a multiplier of 2.05, which is within a range of reasonableness for other awards that have been approved."); *Del Global*, 186 F. Supp. 2d at 369 (awarding fee equal to a 4.65 multiplier, which was "well within the range awarded by courts in this Circuit and courts throughout the country"); *In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 WL 2049726, at *3 (S.D.N.Y July 16, 2007) (awarding 30% fee representing a 2.99 multiplier and finding that the multiplier "falls well within the parameters set in this district and elsewhere"); *Davis*, 827 F. Supp. 2d at 185 (awarding fee representing a multiplier of 5.3, which was "not atypical" in similar cases).[5]

[5] *See also Cornwell v. Credit Suisse Grp.*, No. 08-cv-03758 (VM), slip op. at 4 (S.D.N.Y. July 18, 2011), ECF No. 117 (awarding fee representing a 4.7 multiplier) (Ex. 13); *Comverse*, 2010 WL

In sum, Co-Lead Counsel's requested fee award is within the range of what courts in this Circuit regularly award in class actions such as this one, whether calculated as a percentage of the fund or in relation to Co-Lead Counsel's lodestar. Moreover, as discussed below, each of the factors established by the Second Circuit in *Goldberger* supports a finding that the requested fee is reasonable.

VI. OTHER FACTORS CONSIDERED BY COURTS IN THE SECOND CIRCUIT CONFIRM THAT THE REQUESTED FEE IS FAIR AND REASONABLE

The Second Circuit has set forth the following criteria that courts should consider when reviewing a request for attorneys' fees in a common fund case:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50 (internal quotes and citation omitted). Consideration of these factors, together with the analyses above, demonstrates that the requested fee is reasonable.

2653354, at *5 (awarding fee representing a 2.8 multiplier); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. Sept. 10, 2008) ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court."); *In re Deutsche Telekom AG Sec. Litig.*, No. 00-CV-9475 (SHS), 2005 WL 7984326 at *4 (S.D.N.Y. June 14, 2005) (awarding fee representing a 3.96 multiplier); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 135 (D.N.J. 2002) (a 4.3 multiplier was appropriate in light of the contingency risk and the quality of the result achieved); *Bd. of Trustees of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, No. 09 Civ. 686 (SAS), 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (awarding fee representing a 2.86 multiplier).

A. The Time and Labor Expended Support the Requested Fee

The time and effort expended by Co-Lead Counsel in prosecuting the Action and achieving the Settlement supports the requested fee. As set forth in greater detail in the Joint Declaration, Plaintiffs' Counsel's work on this matter included, among other things:

- conducting an extensive investigation of the claims asserted in the Action, which included a detailed review of SEC filings, press releases, analyst reports, news reports and other public information, interviews with former Penn West employees, and consultation with accounting and damages experts (¶ 12);
- researching and drafting the detailed 116-page Consolidated Amended Class Action Complaint ("Complaint") based on their investigation (¶ 13);
- briefing three comprehensive motions to dismiss the Complaint (¶¶ 15-21);
- consulting extensively with experts on damages and loss causation issues in connection with preparing for settlement negotiations (¶¶ 4);
- engaging in a mediation process overseen by Judge Daniel Weinstein (Ret.) of JAMS, which involved extensive written submissions concerning liability and damages, a full-day formal mediation session, additional consultations with Lead Plaintiffs' damages expert, and weeks of follow-up negotiations followed by the review and, ultimately, acceptance of the mediator's recommendation (¶¶ 22-26);
- negotiating and drafting the Stipulation and related settlement documents (¶ 27);
- drafting the preliminary approval motion papers (*Id.*);
- working with Lead Plaintiffs' damages expert to prepare the proposed Plan of Allocation (¶ 56); and
- conducting due diligence, with the right to withdraw from the Settlement if the Mediator issued a written determination that the information produced by Penn West rendered the proposed Settlement unfair, unreasonable, and inadequate. Lead Plaintiffs' due diligence was substantial, and included reviewing approximately 20,000 pages of documents concerning (a) Penn West's lack of ability to pay settlement amounts beyond its applicable insurance coverage, and (b) Penn West's auditor, KMPG, as well as an interview with current Penn West CFO David Dyck on those topics. (¶¶ 30-33).

Moreover, the legal work on this case will not end with the Court's approval of the proposed Settlement. Additional hours and resources will necessarily be expended assisting Settlement Class Members with their Proof of Claim forms, responding to Settlement Class

Members' inquiries, shepherding the claims process to conclusion and filing a distribution motion. No additional compensation will be sought for this work. *See Facebook*, 2015 WL 6971424, at *10 ("Considering that the work in this matter is not yet concluded for Plaintiffs' counsel who will necessarily need to oversee the claims process, respond to inquiries, and assist Class Members in submitting their Proof of Claims, the time and labor expended by counsel in this matter support a conclusion that a 33% fee award in this matter is reasonable.").

The substantial time and effort devoted to this case by Plaintiffs' Counsel to obtain the US$19,759,282 Settlement confirms that the fee request is reasonable.

B. The Risks of the Litigation Support the Requested Fee

"[T]he risk of success [is] 'perhaps the foremost' factor to be considered in determining" a reasonable award of attorneys' fees. *Goldberger*, 209 F.3d at 54; *see also Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331 (CM)(MHD), 2014 WL 1224666, at *21 (S.D.N.Y. Mar. 24, 2014) ("The Second Circuit long ago recognized that courts should consider the risks associated with lawyers undertaking a case on a contingent fee basis."). This is because "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) (citation omitted). In applying this factor, courts have repeatedly recognized that "class actions confront even more substantial risks than other forms of litigation" ,*Comverse*, 2010 WL 2653354, at *5 (citation omitted), and that "[s]ecurities class actions such as

this are 'notably difficult and notoriously uncertain.'" *Flag Telecom*, 2010 WL 4537550, at *27 (citations omitted).[6] This case was no different.

From the outset of this Action, Co-Lead Counsel understood they were embarking on a complex, expensive, and potentially lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and money the case would require. In undertaking that responsibility, counsel were obligated to ensure that sufficient resources were dedicated to the prosecution of the Action, and that funds were available to compensate staff and to cover the considerable costs that a case such as this requires. *See Flag Telecom*, 2010 WL 4537550, at *27. Co-Lead Counsel received no compensation during nearly two years of litigation, and they advanced or incurred over $320,000 in expenses in prosecuting this Action for the benefit of the Settlement Class. ¶¶ 79, 81. Had Co-Lead Counsel not achieved the Settlement, this significant investment of time and money would have been lost.

As discussed below and in the Joint Declaration, while Lead Plaintiffs remain confident in their ability to prove their claims and rebut Defendants' arguments, the pursuit of this case through the briefing of Defendants' motions to dismiss, settlement negotiations, and the due diligence process has revealed meaningful potential barriers to recovery. Obstacles included both the well-known general risks of complex securities litigation, as well as the specific risks inherent in this case. ¶¶ 34-47; *see also Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009) (O'Connor, J. (Ret.)) ("To be successful, a securities class-action plaintiff

[6] *See also Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (Pollack, J.) ("Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.").

must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action.").

This Action presented a number of substantial risks to establishing liability and damages. To start, Lead Plaintiffs would have faced significant hurdles in proving scienter to the ultimate finder of fact. As explained more fully at ¶¶ 40-41 of the Joint Declaration, Defendants raised credible arguments directed at the adequacy of Lead Plaintiffs' allegations concerning whether Defendants acted with sufficient knowledge or recklessness to prevail under the federal securities laws. For instance, Defendants had argued and would continue to argue that Lead Plaintiffs had not alleged any motive to engage in fraud through insider trading, and could not point to any witnesses, internal documents or other particularized facts that supported their allegations that Defendants knowingly or recklessly committed securities fraud. Defendants would also continue to maintain that the accounting errors at issue in Penn West's restatement (such as the misclassification of operating expenses as capital expenses) were determinations that required the application of professional judgment and, thus, the accounting misstatements were not intentional. Moreover, Defendants would be able to point to the fact that some of the accounting errors had gone the other way – that is, capital expenses had also been misclassified as operating expenses (an error that would tend to reduce revenues and other key metrics) – as supporting their view that the accounting errors resulted from failures of judgment or inadequate controls, not a systemic effort by the Company to mislead investors. Defendants could also point to the fact that KPMG signed off each year on the accuracy of Penn West's financial statements and the effectiveness of the Company's internal accounting controls. This provided Defendants with an argument that the Individual Defendants and Penn West's other senior management had reasonably relied on KPMG's approval of the financial statements, which could have made proof of scienter at trial

extremely difficult. Finally, Defendants argued that the timing and handling of the restatement actually demonstrated their lack of scienter – *i.e.*, that the Company's executive officers had relied on its accounting personnel and outside auditors, and then promptly corrected and disclosed the accounting errors when those errors came to management's attention. While Lead Plaintiffs would argue that the nature and magnitude of the accounting errors supported an inference of scienter, had the litigation continued, it was not guaranteed that Lead Plaintiffs would have prevailed at the pleading stage, let alone summary judgment and trial.

Lead Plaintiffs would also have confronted considerable challenges in establishing loss causation and damages. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (plaintiffs bear the burden of proving "that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover'"). While Lead Plaintiffs would have argued that the declines in Penn West's stock price were attributable to corrections of the alleged misstatements and omissions concerning Penn West's financial statements, Defendants would have asserted that much of the decline was due to other negative news, and that even if some portion of the decline in Penn West's stock price was caused by corrective disclosures, damages were minimal. In this regard, a major point of disagreement between the Parties concerned the decline in Penn West's stock price in reaction to the Company's November 6, 2013 quarterly earnings announcement. Lead Plaintiffs maintained that the November 6, 2013 announcement revealed problems with Penn West's operating cost structure, which were among the risks concealed by Defendants' alleged fraud. Defendants, however, had strong arguments that the declines in Penn West's stock price following that announcement were not attributable to disclosure of the fraud because the announcement was made nearly nine months *before* Penn West disclosed it was reviewing its financials and intended to issue a restatement, and the announcement itself did not directly reveal anything about improper

classification of expenses or any other accounting error. Simply put, the Parties held extremely disparate views on loss causation and damages, and had Defendants' arguments been accepted in whole or part, they would have dramatically limited any potential recovery. *See In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig*., 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) ("When the success of a party's case turns on winning a so-called 'battle of experts,' victory is by no means assured."); *In re Cendant Corp. Litig*, 264 F.3d 201, 239 (3d Cir. 2001) ("[E]stablishing damages at trial would lead to a 'battle of experts' with each side presenting its figures to the jury and with no guarantee whom the jury would believe.").

Moreover, Lead Plaintiffs still faced the substantial burdens of a class certification motion, summary judgment motions, trial and likely appeals – a process which could possibly extend for years and might lead to a smaller recovery, or no recovery at all. Indeed, even prevailing at trial would not have guaranteed a recovery larger than the Can$26,500,000 Settlement – especially given the Company's compromised financial condition, as discussed below. *See Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015), *reh'g denied* (July 1, 2015) (reversing jury verdict awarding investors $2.46 billion on loss causation and damages grounds and remanding for a new trial on these issues); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, No. 07-61542-CIV, 2011 WL 1585605, at *20-22 (S.D. Fla. Apr. 25, 2011) (following a jury verdict in plaintiffs' favor on liability, the district court granted defendants' motion for judgment as a matter of law because there was insufficient evidence to support a finding of loss causation), *aff'd*, *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012).

Finally, this case presented very real ability-to-pay issues, as Penn West's financial condition deteriorated severely during the pendency of the litigation. Penn West is one of Canada's largest producers of oil and natural gas. Over the course of the litigation, oil prices declined sharply, falling from approximately $100 per barrel to approximately $30 per barrel. Consequently, Penn West's financial condition and cash position deteriorated severely. For example, since the filing of the Complaint in December 2014, Penn West has reported more than $2.6 billion in net losses. The Company has also undertaken a series of drastic steps, including suspending its dividend, laying off a substantial portion of its workforce, and selling numerous assets (*i.e.*, oil fields) in order to reduce expenditures and raise cash. In its most recent financial statements, issued on March 10, 2016, for the year ending December 31, 2015, Penn West reported only Can$2 million cash on its balance sheet. Its stock price, which was $7.85 at the end of the Settlement Class Period, has declined substantially and, as of June 2, 2016, was trading at approximately $0.67 per share. In September 2015 and again in January 2016, Penn West received notification from the NYSE that its stock faced suspension and possible de-listing if its stock price did not recover to exceed an average of $1 for 30 trading days. More recently, on May 16, 2016, Penn West issued a press release stating that it anticipated that it would not be in compliance with its financial covenants as of June 30, 2016, and therefore it was not certain as to its ability to continue as a going concern.

Penn West's deteriorating financial position meant that its insurance coverage was the only practical source of recovery for both the U.S. and Canadian actions. Indeed, Lead Plaintiffs' valuation expert examined the Company's financial condition and concluded that it lacked the ability to fund a settlement in excess of its insurance coverage. *See* Affidavit of J.T. Atkins (Ex. 3) at ¶¶ 2, 28. These insurance funds would be reduced by defense costs if litigation continued –

a reduction that would have been particularly pronounced because the Company was litigating this securities class action in the U.S. and multiple cases in Canada. Accordingly, there was a very significant risk that the Action might yield a small recovery – or indeed no recovery at all – following many years of hard-fought litigation.

Despite the many uncertainties regarding the outcome of the case, Co-Lead Counsel undertook this case on a wholly contingent basis, knowing that the litigation could last for years and would require the devotion of a substantial amount of time and a significant expenditure of litigation expenses. Co-Lead Counsel's assumption of this contingency fee risk strongly supports the reasonableness of the requested fee. *See Flag Telecom*, 2010 WL 4537550, at *27 ("Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk.").

C. The Magnitude and Complexity of the Action Support the Requested Fee

Courts have repeatedly recognized the "notorious complexity" of securities class action litigation. *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006); *Taft*, 2007 WL 414493 at *10; *La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, No. 03-CV-4372 (DMC), 2009 WL 4730185, at *8 (D.N.J. Dec. 4, 2009) ("securities class actions are inherently complex"). Courts have also recognized that "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA," and other changes in the law. *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000); *see also AOL Time Warner*, 2006 WL 903236, at *9 ("[T]he legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss

causation and the calculation of damages. These challenges are exacerbated . . . where a number of controlling decisions have recently shed new light on the standard for loss causation."). Such was the case here.

As noted above and in the Joint Declaration, the litigation raised a number of complex questions concerning the proper accounting for expenses in the oil and gas industry, as well as liability and loss causation issues that would have required extensive efforts by Co-Lead Counsel and consultation with multiple experts to bring to resolution. To build the case, Co-Lead Counsel were, among other things, required to: (i) conduct an extensive factual investigation, which included interviews with numerous former Penn West employees, significant time consulting with accounting and loss causation and damages experts, and a broad review of all publicly available information; (ii) prepare the 116-page complaint; (iii) brief Defendants' three motions to dismiss; and (iv) submit written mediation statements and make presentations to a well-respected and inquisitive mediator concerning Lead Plaintiffs' theories of liability, damages, loss causation and ability to pay. If the Action had not been settled, there would have been copious amounts of additional litigated discovery; depositions of fact and expert witnesses; additional motion practice; a trial; post-trial motion practice; and mostly likely appeals.

Accordingly, the magnitude and complexity of the Action supports the conclusion that the requested fee is fair and reasonable. *See City of Providence*, 2014 WL 1883494, at *16 ("the complex and multifaceted subject matter involved in a securities class action such as this supports the fee request.").

D. The Quality of Co-Lead Counsel's Representation Supports the Requested Fee

The quality of the representation by Co-Lead Counsel is another important factor that supports the reasonableness of the requested fee. Co-Lead Counsel submits that the quality of its

representation is best evidenced by the quality of the result achieved. *See Veeco*, 2007 WL 4115808, at *7; *Global Crossing*, 225 F.R.D. at 467. Here, the Settlement provides a very favorable result for the Settlement Class in light of the serious risks of continued litigation and the Company's compromised financial condition. *See EVCI*, 2007 WL 2230177, at *17 ("Given the Company's limited financial wherewithal and the wasting nature of its insurance policies, Lead Counsel maximized the Class's recovery."). It also represents a significant portion of likely recoverable damages. *See* ¶ 47. Co-Lead Counsel respectfully submit that the quality of their efforts in the litigation to date, together with their substantial experience in securities class actions and commitment to this litigation, provided Co-Lead Counsel with the leverage necessary to negotiate the Settlement. *See* Joint Decl., Exs. 5A-3 and 5B-3 (firm resumes of BLB&G and GP&M); *see also Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 277 F.R.D. 97, 110 (S.D.N.Y. 2011) ("It is also beyond serious dispute that class counsel – Bernstein Litowitz Berger & Grossmann LLP – is qualified and capable of prosecuting this action."); *Hung v. Idreamsky Tech. Ltd.*, No. 15-CV-2514 (JPO), 2016 WL 299034, at *6 (S.D.N.Y. Jan. 25, 2016) (appointing GP&M to serve as co-lead counsel pursuant to PSLRA).

Courts have also recognized that the quality of the opposition faced by plaintiffs' counsel should be taken into consideration in assessing the quality of the counsel's performance. *See, e.g.*, *Veeco*, 2007 WL 4115808, at *7 (among factors supporting 30% award of attorneys' fees was that defendants were represented by "one of the country's largest law firms"); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529 LMM, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work") (citation omitted), *aff'd*, 272 F. App'x 9

(2d Cir. 2008). Here, Defendants were represented by Sullivan & Cromwell LLP, Covington & Burling LLP, Baker Botts L.L.P., Morvillo Abramowitz Grand Iason & Anello PC and Lankler Siffert & Wohl LLP, all of which are accomplished law firms that vigorously represented the interests of their clients throughout this Action. *See* ¶ 72. Notwithstanding this formidable opposition, Co-Lead Counsel's thorough investigation, ability to present a strong case, and demonstrated willingness to vigorously prosecute the Action enabled Co-Lead Counsel to achieve the favorable Settlement. Consequently, this factor militates in favor of the requested fee.

E. The Requested Fee in Relation to the Settlement Amount

Courts have interpreted this factor as requiring the review of the fee requested in terms of the percentage it represents of the total recovery. "When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *Comverse*, 2010 WL 2653354, at *3 (citation omitted). As discussed in detail in Part III above, the requested 25% fee is well within the range of percentage fees that courts in the Second Circuit have awarded in comparable cases. Accordingly, the fee requested is reasonable in relation to the Settlement.

F. Public Policy Considerations Support the Requested Fee

"In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered." *Del Global*, 186 F. Supp. 2d at 373. This is because private actions such as this one serve to further the objective of the federal securities laws to protect investors. "[The Supreme] Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). If the "important public policy [of enforcing the securities laws] is to be carried out, the courts

should award fees which will adequately compensate [Co-]Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook." *Flag Telecom*, 2010 WL 4537550, at *29. "[A]s a practical matter, lawsuits such as this one can only be maintained if competent counsel can be retained to prosecute them. This will occur if courts award reasonable and adequate compensation for such services where successful results are achieved." *City of Providence*, 2014 WL 1883494, at *18; *see also Hicks*, 2005 WL 2757792, at *9. Accordingly, public policy considerations favor Co-Lead Counsel's attorneys' fee request. *See In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) ("The Court finds that public policy supports granting attorneys' fees that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC.").

G. The Reaction of the Settlement Class to Date Support the Requested Fee

The overwhelmingly positive reaction of the Settlement Class to date also supports the requested fee. *See Flag Telecom*, 2010 WL 4537550, at *29 ("numerous courts have noted that the lack of objection from members of the class is one of the most important factors in determining the reasonableness of a requested fee."). Through June 2, 2016, the Claims Administrator had disseminated the Notice to 273,414 potential Settlement Class Members and nominees informing them, among other things, that Co-Lead Counsel intended to apply to the Court for an award of attorneys' fees in an amount not to exceed 25% of the Settlement Fund and up to US$525,000 in Litigation Expenses. While the time to object to the Fee and Expense Application does not expire until June 20, 2016, to date, not a single objection has been received. ¶¶ 77, 88. The lack of

objections is "strong evidence" of the reasonableness of the fee request. *Ressler v. Jacobson,* 149 F.R.D. 651, 656 (M.D. Fla. 1992).[7]

VII. CO-LEAD COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Co-Lead Counsel also request reimbursement of $320,317.47 in expenses incurred while prosecuting the Action. In support of this request, Co-Lead Counsel have submitted separate declarations attesting to the accuracy of these expenses, which are properly recovered by counsel. *See Flag Telecom*, 2010 WL 4537550, at *30 ("It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class"); *In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) (court may compensate class counsel for reasonable out-of-pocket expenses necessary to the representation of the class). A significant portion of the expenses were incurred for professional services rendered by Lead Plaintiffs' experts, investigators and the mediator, and the remaining expenses are attributable to the costs of copying documents, legal and factual research, travel and other incidental expenses incurred in the course of the litigation. *See* ¶¶ 81-85, and Ex. 6 (breakdown of expenses by category). These expenses were critical to Lead Plaintiffs' success in achieving the proposed Settlement, are reasonable in amount, and are customary and necessary expenses for a complex securities action. As such, they should be reimbursed. *See Flag Telecom*, 2010 WL 4537550, at *30; *Global Crossing*, 225 F.R.D. at 468 ("The expenses incurred-which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review-are the type for which 'the paying, arms' length market' reimburses attorneys. For this reason, they are properly chargeable to the Settlement fund.")

[7] Should any objections be received, Co-Lead Counsel will address them in their reply papers.

(citation omitted). Additionally, no objections to the expense request have been received, and the amount requested is below the US$525,000 limit disclosed in the Notice. *See* Notice, attached as Exhibit A to Thurin Decl. (Ex. 4), ¶¶ 5, 80. Accordingly, Co-Lead Counsel respectfully request payment for these expenses.

VIII. LEAD PLAINTIFFS SHOULD BE AWARDED THEIR REASONABLE COSTS AND EXPENSES UNDER 15 U.S.C. §78u-4(a)(4)

In connection with their request for reimbursement of Litigation Expenses, Co-Lead Counsel also seek reimbursement of a total of $5,241.44 in costs and expenses incurred directly by Lead Plaintiffs Miami FIPO ($241.44) and Avi Rojany ($5,000). The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4).

Here, Lead Plaintiffs took an active role in the litigation by, among other things, reviewing all significant pleadings and briefs in the Action, communicating regularly with Co-Lead Counsel regarding developments in the Action, monitoring the progress of settlement negotiations, and approving the Settlement. *See* Orta Decl. (Ex. 1) ¶ 4-5; Rojany Decl. (Ex. 2) ¶ 4-5. These are "precisely the types of activities that support awarding reimbursement of expenses to class representatives." *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *21 (S.D.N.Y. 2009). Moreover, the requested reimbursement amounts are based on the number of hours Lead Plaintiffs committed to these activities, multiplied by a reasonable hourly rate for their time, and they are reasonable. *See* Orta Decl. ¶ 11; Rojany Decl. ¶ 10. Accordingly, Co-Lead Counsel respectfully request that the Court grant Lead Plaintiffs' requests for reimbursement of "their reasonable costs and expenses incurred in managing this litigation and representing the Class." *Marsh & McLennan*, 2009 WL 5178546, at *21; *see also In re Bank of*

Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig., 772 F.3d 125, 132 (2d Cir. 2014) (affirming PSLRA award of $453,003.04 to representative plaintiffs); *Veeco*, 2007 WL 4115808, at *12 (awarding lead plaintiff $15,900 for time spent supervising litigation, and characterizing such awards as "routine" in this Circuit); *In re Gilat Satellite Networks, Ltd.,* No. CV-02-1510 (CPS)(SMG), 2007 WL 2743675, at *19 (E.D.N.Y. Sept. 18, 2007) (granting PSLRA awards where "the tasks undertaken by employees of Lead Plaintiffs reduced the amount of time those employees would have spent on other work and these tasks and rates appear reasonable to the furtherance of the litigation").

CONCLUSION

For the foregoing reasons, Co-Lead Counsel respectfully request that the Court grant their fee and expense application.

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BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ John Rizio-Hamilton
John Rizio-Hamilton
1251 Avenue of the Americas
New York, NY 10020
Telephone: (212) 554-1400
Facsimile: (212) 554-1444
Email: johnr@blbglaw.com

Counsel for The City of Miami Fire Fighters' and Police Officers' Retirement Trust and Co-Lead Counsel for the Settlement Class

GLANCY PRONGAY & MURRAY LLP

/s/ Lionel Z. Glancy
Lionel Z. Glancy
1925 Century Park East, Suite 2100
Los Angeles, California 90067
Telephone: (310) 201-9150
Facsimile: (310) 201-9160
Email: lglancy@glancylaw.com

Counsel for Avi Rojany and Co-Lead Counsel for the Settlement Class

#982037